

# **EXHIBIT 5**

IT'S NICE, INC., d/b/a  
HAROLD'S CHICKEN SHACK #83, an  
Illinois Corporation,  
  
Plaintiff,  
  
- vs -  
  
STATE FARM FIRE AND CASUALTY  
CO.,  
  
Defendant.

No. 20 L 547  
2-615 Motion

had at the hearing of the above-entitled cause, before  
the Honorable BRYAN S. CHAPMAN, DuPage County,  
Illinois, recorded via Zoom and transcribed by  
Kristin M. Barnes, Certified Shorthand Official Court  
Reporter, commencing on the 29th day of September,  
2020.

Kristin M. Barnes, CSR  
Official Court Reporter  
CSR No. 084-004026

PRESENT:

FRANKLIN LAW GROUP, by  
MR. RYAN ENDSLEY,

appeared on behalf of the Plaintiff;

SUDEKUM, CASSIDY & SHULRUFF, CHTD., by  
MS. FLORENCE M. SCHUMACHER and  
MR. FREDERICK J. SUDEKUM, III,

appeared on behalf of the Defendant.

1 THE COURT: All right. Good morning, Counsel.

2 MR. ENDSLEY: Good morning, your Honor.

3 THE COURT: All right. This is 20 L 547, It's  
4 Nice, Inc. versus State Farm Fire and Casualty.

5 We come on for a 2-615 motion in connection  
6 with It's Nice's claim for coverage under the policy.

7 I've had a chance to read the motion, the  
8 corresponding briefing, and I know there had been some  
9 motions for leave to file supplemental authority. I  
10 have had a chance to look at those motions.

11 I assume both parties are okay with each side  
12 submitting their respective -- their respective briefs  
13 in support of their -- their respective authority in  
14 support of their positions.

15 Is that a fair characterization?

16 MR. ENDSLEY: Yes, your Honor. For It's Nice, at  
17 least.

18 THE COURT: Sure.

19 MS. SCHUMACHER: State Farm as well, your Honor,  
20 there's no objection.

21 THE COURT: All right. Why don't we go ahead and  
22 have the parties state their names for the record.

23 MS. SCHUMACHER: Sure.

24 Florence Schumacher and Rick Sudekum here on

1       behalf of State Farm.

2               THE COURT:   Uh-huh.

3               MR. ENDSLEY:   Ryan Endsley on behalf of It's Nice,  
4       Inc.

5               THE COURT:   Okay.   What I'd like to do here, guys,  
6       I have spent considerable time with the -- with the  
7       courtesy copies.   I've got my tabs.   Like I said, I've  
8       read the authority.   I've read the additional authority  
9       submitted.

10               I don't necessarily need a regurgitation of  
11       the positions already taken in the briefs.   I feel like  
12       I have adequately familiarized myself with the parties'  
13       positions.

14               I do want to give the parties a chance to  
15       make their record here.   I appreciate the issue and  
16       that it's kind of a fastly moving issue through the  
17       courts right now, and, as a result, I want to give the  
18       parties a chance a make their record.

19               That said, I don't necessarily need, you  
20       know, sort of, your Honor, this is how insurance  
21       policies work.   I mean, tell me whatever you want to  
22       tell me.   I may have a question or two for the parties,  
23       but I'll let you make your record first.

24               State Farm, it's your motion.   I'll let you

1 go ahead if there's anything you want to add.

2 MS. SCHUMACHER: Sure, your Honor.

3 I am going to briefly run through our  
4 argument again, trying to sort of work in some of those  
5 cases that have come in more recently.

6 I understand that the court is familiar with  
7 insurance policies in general, so we won't -- hopefully  
8 won't belabor you with too much elementary insurance  
9 law here.

10 Obviously, the plaintiffs know -- or the  
11 court knows that the plaintiff is seeking to recover  
12 for a business interruption loss resulting from the  
13 COVID-19 pandemic and the executive orders.

14 In our view, there are basically two main  
15 barriers to plaintiffs being able to state a cause of  
16 action. The first is the lack of accidental direct  
17 physical loss and the second is the virus exclusion.

18 The way I look at these, your Honor, it's  
19 sort of like -- the lack of accidental direct physical  
20 loss is like a 10-foot hurdle and the virus exclusion  
21 is like a brick wall. So even if the plaintiffs could  
22 plead accidental direct physical loss, which they  
23 can't, they're going to run right into the virus  
24 exclusion and there's not going to be any coverage for

1       that reason either.

2               THE COURT: That was my -- that was the one thing  
3 I wondered a little bit about in reading your briefing,  
4 more the structure of your brief.

5               MS. SCHUMACHER: Right.

6               THE COURT: You led with the virus exclusion, and,  
7 to my mind, there's an insuring agreement here as a  
8 preliminary matter and we only get to the virus  
9 exclusion if the court finds that there is, in fact,  
10 accidental direct physical loss to the property in the  
11 first instance.

12              You would agree with that?

13              MS. SCHUMACHER: I would, your Honor.

14              THE COURT: Okay.

15              MS. SCHUMACHER: You know, the court is  
16 familiar -- it's the trigger of coverage. I mean, just  
17 like in a life insurance policy, until you have the  
18 death of the insured, there's no coverage to begin  
19 with.

20              It's the same for these policies. They're  
21 property policies, so their triggering coverage is  
22 accidental direct physical loss. You know, you can't  
23 just skip this part. It's the trigger of coverage.  
24 It's something that the plaintiff has the burden of

1 proof on.

2 So, in this case, the covered property is the  
3 restaurant property, so the first question is, where is  
4 the accidental direct physical loss pleaded, and our  
5 response, obviously, is that it isn't.

6 So, you know, just looking briefly at the  
7 complaint, you know, they allege that there was no  
8 virus on the property and their accidental direct  
9 physical loss argument is based on loss and use.

10 But, you know, my first point is, it has to  
11 be accidental direct physical loss, and I think it's  
12 undisputed that there was no difference to this  
13 property physically on the day before these executive  
14 orders were issued than there was on the day after, so  
15 physically the property was exactly the same.

16 So where's the loss? Where's the loss  
17 they're arguing? They're saying that loss of use is  
18 sufficient, that they couldn't use the property in the  
19 same way, and that somehow that constitutes accidental  
20 direct physical loss to the property, and we disagree  
21 with that position.

22 So we believe that the Illinois law and all  
23 these cases that have recently come out correctly hold  
24 that loss of use of property without any physical



1 change to that property cannot constitute accidental  
2 direct physical loss.

3 THE COURT: Mr. Endsley, at the risk of stealing  
4 your thunder, I'm going to ask Ms. Schumacher  
5 why don't you go ahead and respond to the western  
6 district of Missouri cases that were cited by It's Nice  
7 where it looks like some district courts in the western  
8 district have found, you know, sort of a lack of  
9 definition in the policy for physical damage or loss  
10 of -- you know, what are the factual distinctions in  
11 those cases, if any --

12 MS. SCHUMACHER: Right, right.

13 THE COURT: -- as to why the court should not find  
14 those cases persuasive here as opposed to some of the  
15 cases you've cited?

16 MS. SCHUMACHER: Sure.

17 So the first thing I would say, the court  
18 says there are courts in the western district of  
19 Missouri. What we actually have is one court -- it's  
20 the same judge in the two cases -- who has gone  
21 essentially the other way on this accidental direct  
22 physical loss question.

23 Those cases are factually distinguishable on  
24 two main grounds. The first is that the plaintiffs in

1       those cases argue that they had virus on the premises.  
2       So the plaintiff in this case has not even alleged that  
3       there was any virus present.

4               The second distinction is in the policy  
5       language. So the trigger of coverage in those  
6       policies, in the Studio 417 and the other case, were --  
7       I think I've got the exact language here -- accidental  
8       direct -- or accidental physical loss or accidental  
9       physical damage.

10              And so the court in Studio 417 felt that it  
11       had to somehow -- you know, focusing on that  
12       disjunctive *or*, the court found that it had to give  
13       separate meaning to physical loss and physical damage.

14              That's not the case in our policy. There's  
15       one trigger of coverage, which is accidental direct  
16       physical loss to property.

17              We also have a virus exclusion, which wasn't  
18       present in those cases, but I know the court is asking  
19       me about physical loss.

20              So I would say the first and the most  
21       important distinguishing factor is, obviously, the  
22       pleading in this case -- I think it's in paragraphs, I  
23       think, 25 and 36 of the complaint where the plaintiffs  
24       specifically deny that they had any virus present on

1 premises.

2 And, again, I would disagree with Studio 417.  
3 I'm not sure even in their presence a virus is enough.  
4 Other courts have disagreed with that opinion as well,  
5 but I think for our purposes in our complaint we have a  
6 complaint that alleges the absence of the virus. And  
7 then, obviously, we have a policy that doesn't have  
8 that *or* in there that the Studio 417 court seemed to  
9 think was determinative.

10 THE COURT: All right. Anything else you want to  
11 add?

12 MS. SCHUMACHER: Just jumping briefly into the  
13 virus exclusion, your Honor, in case we get there, we  
14 have that anti-concurrent causation language which  
15 broadly excludes coverage when a loss would not have  
16 occurred in the absence of a virus.

17 That language, that anti-concurrent causation  
18 language, has been upheld in Illinois. The virus  
19 exclusion clearly applies in this case. There is no  
20 requirement in that policy language that the virus be  
21 physically present on the property, like plaintiff  
22 alleges. They're just adding language to the exclusion  
23 which isn't present. The exclusion needs to be applied  
24 as written. It unambiguously excludes a broad range of

1        losses. Virus is one of them.

2                Oh, the argument about, you know, the  
3        proliferation issue, that somehow those two  
4        subparagraphs of the virus exclusion need to be read  
5        together, that's just not correct. The virus portion  
6        of that exclusion is separate. It says that loss is  
7        excluded, current virus, bacteria, or other  
8        microorganism.

9                So, again, I think it's -- I don't see how it  
10       could possibly be ambiguous: I mean, this -- clearly  
11       we have a too late chain of causation here. The virus  
12       caused the executive orders which caused the loss and  
13       it's excluded under the virus exclusion.

14               THE COURT: Okay. Mr. Endsley, do you want to  
15       respond to anything that's -- do you want to respond  
16       with anything that's not in your brief? Or if there's  
17       a point or two you want to emphasize, I'm happy to give  
18       you a chance to do so.

19               MR. ENDSLEY: Thank you, your Honor.

20               So I just wanted to highlight a couple of  
21       things. In particular, we -- you know, the Studio 417  
22       case, we have the same situation where State Farm  
23       elected not to define physical loss or damage. And, in  
24       this case, while counsel has pointed out that this

1 policy only says physical loss, that's really the  
2 broader of the two. Physical damage is what's probably  
3 more in line with what State Farm's position is, which  
4 is that a physical loss or damage must be a structural  
5 alteration.

6 And the fact is that I think the Illinois  
7 courts have not limited themselves quite so much to  
8 structural physical alteration as State Farm would like  
9 the court to believe. In particular, it's sort of an  
10 all squares are rectangles argument. They cite cases  
11 which are saying, you know, a change in color or shape  
12 or appearance to the property is a physical loss or  
13 damage, which is true, but that's not the only type of  
14 physical loss.

15 And I think sort of looking at the asbestos  
16 cases really sort of points that out, and State Farm's  
17 position really throughout the briefs has been that  
18 Illinois law requires a physical alteration to the  
19 structure, and that's just not really what Illinois  
20 case law actually says.

21 The other thing I'd sort of like to  
22 highlight -- and this impinges a little bit on both the  
23 virus exclusion and the physical loss or damage -- and  
24 that's sort of the nature of an exclusion. And I know

1       that this is, you know, kind of a basic insurance  
2       issue, but the fact is that an exclusion exists to  
3       exclude coverage which would otherwise be present.

4               A virus cannot cause physical alteration to  
5       the building, as far as I'm aware. If there's a way  
6       that it can be done, State Farm certainly hasn't  
7       articulated it. So at least this policy, as written,  
8       clearly seems to contemplate nonphysical alterations  
9       which would otherwise be covered causes of loss.

10              And that's a problem for the policy in a  
11       couple -- for State Farm in a couple of ways in that  
12       State Farm wants to apply the virus exclusion where it  
13       was not present. Even in the absence of a virus  
14       exclusion, if the governor had never closed the  
15       building, It's Nice could never have made a claim  
16       for -- under this policy because the coronavirus  
17       existed somewhere. You know, even if there is  
18       absolutely no virus exclusion in a different policy  
19       like that, there just wasn't anything affecting It's  
20       Nice's property.

21              And separately, with the physical loss or  
22       use, when you're reading the policy, a number of these  
23       exclusions, including, you know, both the virus  
24       exclusion itself as well as the government closure

1 exclusion, really does contemplate under the policy  
2 exclusions for nonphysical, nonstructural altering  
3 causes of loss.

4 And that, to me, reads -- particularly when  
5 State Farm has elected not to define loss or -- you  
6 know, physical loss, that's a problem for them because  
7 the policies seem to exclude things which wouldn't be  
8 covered anyway under State Farm's interpretation, and  
9 yet there they are.

10 Reading the policy as a whole and  
11 constructing the ambiguities in favor of coverage,  
12 certainly at this point dismissal seems premature.

13 THE COURT: Counsel, do you have a response to the  
14 virus exclusion argument that the -- as I understand  
15 counsel's argument, it's that the virus -- if we were  
16 to take State Farm's proffered definition of physical  
17 as understood in insurance contracts, the virus  
18 exclusion would never fit that definition because it's  
19 never going to alter a physical structure.

20 I'm going to go to paragraph 23 of your  
21 motion, page 10, where State Farm says, In cases  
22 interpreting the word *physical* in insurance contracts,  
23 *physical* is widely held to exclude alleged losses that  
24 are intangible or incorporeal, such as detrimental

1 economic impact, unaccompanied by distinct demonstrable  
2 physical alteration of property.

3 So how is the virus exclusion consistent with  
4 that proffered definition of *physical*?

5 MS. SCHUMACHER: Well, my first response, your  
6 Honor, is I'm not sure we should assume that a virus  
7 could never alter a structure. We're not familiar with  
8 every --

9 THE COURT: Fair enough.

10 MS. SCHUMACHER: -- virus in the world, so I think  
11 that the exclusion -- you know, I look at it as sort of  
12 a belt and suspenders approach. I mean, surely I think  
13 this virus is not causing physical damage, but that  
14 certainly doesn't mean that there's no virus that could  
15 ever develop that doesn't cause physical damage and  
16 bodily injury. We don't know that. So I think, in a  
17 sense, that the insurer clearly wanted to exclude this  
18 kind of loss.

19 I think in the event that there is some  
20 unexpected virus that comes up in the future that could  
21 cause physical damage, I think the insurer is well  
22 within its right to, you know, exclude that in the  
23 event that that might happen some day.

24 It's clearly in the policy. The insured was



1     aware of it. It's a broad exclusion. And, again, I  
2     think their whole question is just based on the  
3     assumption that all viruses are going to be like this  
4     virus, and I just don't think that that's the case.

5             THE COURT: Counsel, Mr. Endsley, let me ask you a  
6     question.

7             One of the things, as I've thought about this  
8     case a little bit, I'm worried a little bit or I'm  
9     concerned at least about, were the court to accept your  
10    argument as to loss of use, I'm concerned about a  
11    limiting principle or lack thereof in terms of what is  
12    the underwritten risk here.

13            And there appears to be, to my mind,  
14    different types of coverage available for loss of use,  
15    whether it is, in fact, civil authority when you think  
16    about the cases right after 9/11 around the World Trade  
17    Center. There's a lot of case law coming down in the  
18    southern district of New York in the second circuit  
19    involving business interruption where civil authority  
20    has retail shops shut down but you've got physical  
21    damage to other property, ingress/egress sorts of  
22    issues.

23            Without the loss of use, sort of, well,  
24    there's physical accidental physical loss to property

1 if I can't access it, that strikes me, when I look at  
2 the policy in its entirety, to be potentially a very  
3 different risk than what may have been contemplated  
4 here.

5 Is that a fair concern?

6 MR. ENDSLEY: So I think that is something of a  
7 concern. But to alleviate that a little bit, we're  
8 dealing with a fairly unique set of circumstances and I  
9 think there sort of still is a principle here.

10 If the governor's orders hadn't actually  
11 required closure, if they, you know, had limited how  
12 many patrons you could have in the restaurant or if  
13 the -- you know, the effect of the general governor's  
14 orders to shelter at home had been to reduce income,  
15 you know, if we were talking about loss of income,  
16 that's not a covered cause of loss.

17 And, in fact, I think some of the cases cited  
18 by State Farm sort of indicate what the -- what the  
19 difference is -- and those would be the Anchor  
20 [phonetic] and Keach [phonetic] cases. And,  
21 particularly, those focused on the difference between  
22 when something is actually completely closed down and  
23 when it's merely suffered, you know, a loss of business  
24 income, and there really is a significant difference

1       here.

2                   And the other thing I would sort of add, as  
3       far as a policy situation, is I think the tremendous  
4       number of lawsuits we've seen from this is sort of an  
5       indication that a lot of these insureds thought that  
6       this would have been covered, something like this, and  
7       learned only late in the game that it wasn't or at  
8       least the insurance company thought it wasn't.

9                   And I'd just sort of articulate again, you  
10      know, the basic principle that ambiguities in the  
11      policy are construed against the drafter. State Farm  
12      was the one who got to say what this policy looked  
13      like, State Farm was the one who got to draft the  
14      language of the policy, and, frankly, had put a lot  
15      more thought into it than any of their insureds.

16                  So I think to say that, you know, this wasn't  
17      in the contemplation of the parties, it was at least a  
18      little bit. State Farm has a number of exclusions  
19      which nearly but do not quite apply. They were able to  
20      draft around this.

21                  And, frankly, exclusions exist in certain  
22      policies which do address this specific concern. We've  
23      reviewed a couple of them from client -- from potential  
24      clients who wanted coverage and actually saying that if

1       there's a government closure order because of a  
2       pandemic, no coverage.

3               So there are ways for the insurer to protect  
4       themselves from this, but in this case it's the insured  
5       who really had this dropped on them unexpectedly and is  
6       now having to litigate.

7               THE COURT: Well, certainly, obviously, companies  
8       and businesses around the world and certainly the  
9       country and certainly Illinois are faced with a  
10      remarkable predicament through largely no cause of  
11      their own, if at all, as a result of the pandemic.

12              Let me be very clear. I am not -- when I ask  
13      the question about the limiting principle, I am not  
14      suggesting that the court is trying to ascertain the  
15      intent of the parties at this point. I'm simply trying  
16      to ascertain whether or not there's a reasonable  
17      interpretation on the other side.

18              But wouldn't your argument, Mr. Endsley, be a  
19      bit stronger if the definition or if the insuring  
20      agreement language said insure for all accidental  
21      direct physical loss of covered property as opposed to  
22      to?

23              In other words, it's talking about -- I'm  
24      concerned that we're reading direct physical to

1 property. We're kind of just pretending that it  
2 doesn't say what it -- what it clearly says and we're  
3 kind of saying, well, loss of property or loss to  
4 property, same thing, whatever.

5 Wouldn't you have a stronger argument if it  
6 said loss of property?

7 MR. ENDSLEY: In this case, I'm actually not sure  
8 that we would, your Honor.

9 It's Nice still has the property, but the  
10 property suffered a loss of use and that was a loss to  
11 the property. It's Nice hasn't -- you know, the  
12 property isn't gone. It's Nice has, in fact, recently  
13 resumed business operations --

14 THE COURT: So let me ask you a question.

15 If I said, when I think loss to the property,  
16 I think the roof is blown off; okay? That's what I  
17 think of just -- at the very least, at a superficial  
18 level.

19 If you're telling me a closing of the doors  
20 by executive order is a loss to the property, help me  
21 understand why that's the same thing.

22 MR. ENDSLEY: Well, I think you're certainly  
23 correct that, you know, when we think of -- that is  
24 classic losses.

1           THE COURT: That is, to my mind, closer to a loss  
2 of property. It's a functional loss of property, not  
3 to property.

4           MR. ENDSLEY: I guess the best argument I can sort  
5 of think of, just off the spur of the moment, relates  
6 to the fact that the type of property it is is what  
7 affected the loss and that's -- because it's a  
8 restaurant, this was a different type of loss. If this  
9 was just being used as residential housing, there is no  
10 loss to the property.

11                 So State Farm insured a particular type of  
12 business and a particular -- that particular type was a  
13 restaurant which was affected, and that impacted this  
14 property. That was a loss to this specific property  
15 rather than a removal.

16                 So to some extent, you know, if it said *loss*  
17 *of property*, that, to me, almost suggests that  
18 something -- a little more of the structural alteration  
19 argument State Farm prefers, which is almost that  
20 something was removed from the property or just ceased  
21 to exist on the property -- because it was burned up or  
22 something -- whereas I think *to property* sort of  
23 suggests that it's anything that affects, you know,  
24 that business property. It wasn't just the -- you

1 know, this wasn't just a title policy or something like  
2 that. This was a business coverage policy.

3 THE COURT: It doesn't say anything is physical;  
4 right?

5 MR. ENDSLEY: It does say physical.

6 THE COURT: I mean, it's not any conceivable way  
7 you're unable to use the property in the way you see  
8 fit. It's got to be direct physical loss. And, I  
9 guess, your view is loss of use, there's a physical  
10 displacement; right? That's --

11 MR. ENDSLEY: Yes.

12 THE COURT: -- your position?

13 Okay. Ms. Schumacher, if there's anything  
14 you want to respond to, I'll give you the last word.

15 MS. SCHUMACHER: Sure. There are many things.  
16 I'm going to try to stick to a couple.

17 I think the Turek court actually discussed  
18 that *physical loss* to concept and I think it held that  
19 to implies contact and *physical* implies physical  
20 contact, direct physical loss to property.

21 And I looked in the dictionary. They gave  
22 examples like a right uppercut to the jaw or applying  
23 varnish to a surface. Whatever theory they have about  
24 their loss not being able to use the property, that

1        simply is not physical loss to that property.

2                And I just want to briefly touch on -- the  
3        court is concerned about the breadth of their  
4        interpretation. So the first thing they said is, well,  
5        this is a different situation because the restaurant  
6        was required to be closed.

7                I would point out that in the executive  
8        orders they did not close restaurants. Restaurants  
9        were permitted to stay open for takeout or delivery.  
10       So regardless of whether they chose to close the  
11       restaurant, even under their complaint, they weren't  
12       required to. So this is not a situation where  
13       restaurants were closed.

14               The second and more broad point I would make,  
15       your Honor, is that under their theory of accidental  
16       direct physical loss, let's just say after COVID is  
17       over the restaurant is open until 1:00 a.m. There's an  
18       ordinance that says restaurants have to close at  
19       midnight now. According to their theory, they now have  
20       a loss of income claim because the restaurant has to  
21       close an hour early because, according to them, there  
22       doesn't have to be any physical impact; it just has to  
23       affect the use of their property.

24               So, again, I agree with the court's concern



1       that their interpretation is way too broad and it  
2       brings many more things into coverage than are intended  
3       under a property policy which covers accidental direct  
4       physical loss and then loss of income once that's  
5       happened. But you just can't skip that step.

6               And I think that's all I have. I know the  
7       court is familiar with all of this and there was a lot  
8       that was said, but I'd like to keep it as brief as I  
9       can. So I think unless the court has any additional  
10      questions, I think we've made our point.

11             THE COURT: I think we -- I just want to make sure  
12      all the parties agree that regardless of the coverage  
13      form under the all risk policy, everyone agrees that  
14      direct physical loss is required; right?

15             MR. ENDSLEY: Yes.

16             THE COURT: That phrase, that is an insuring  
17      agreement that attaches to all. You know, sometimes  
18      these all risk policies, there's all these amendments,  
19      you know, there's the general exclusions and then  
20      there's the exclusions within the broad form coverage  
21      and there's exclusions within that and those don't  
22      apply to the general -- you know, so that was my review  
23      of the policy, that there was no separate insuring  
24      agreement, everything goes back to Section 1 property

1 insuring agreements, direct physical loss requirement.

2 MS. SCHUMACHER: Yes.

3 THE COURT: Okay.

4 MR. ENDSLEY: Yeah, I believe there was a little  
5 bit of confusion that we were maybe trying to get  
6 coverage under the civil -- civil authority provision,  
7 but that was --

8 THE COURT: Well, as I understand your argument,  
9 you'll take coverage wherever you can find it; right?

10 MR. ENDSLEY: Yes, that's correct.

11 And that all relates back to the all risk  
12 direct physical loss.

13 THE COURT: Right. Okay. Very good. Thank you.

14 Okay. The court is in a position to rule on  
15 this today. The question presented by a 2-615 motion  
16 to dismiss is whether sufficient facts are contained in  
17 the pleadings that, if proved, would entitle the  
18 plaintiff to relief. That's Evers versus Edwards  
19 Hospital, 247 Ill. App. 3d 717.

20 A motion to dismiss under Section 615 admits  
21 all well-pleaded facts but does not admit conclusions  
22 of law or conclusions of fact not supported by  
23 allegations of specific fact.

24 Exhibits -- I assume the policy was, in fact,

1 attached to the complaint?

2 MS. SCHUMACHER: It was -- your Honor, it was  
3 either attached or filed by agreement.

4 I have two different cases. One they  
5 attached a partial policy and then --

6 MR. ENDSLEY: Yeah, I --

7 MS. SCHUMACHER: Was yours the partial policy?

8 MR. ENDSLEY: Yeah, I believe it was attached by  
9 agreement.

10 MS. SCHUMACHER: Okay.

11 THE COURT: The court is --

12 MR. ENDSLEY: There was --

13 THE COURT: The parties are asking the court to  
14 consider the policy, right --

15 MR. ENDSLEY: Yes.

16 MS. SCHUMACHER: Yes, your Honor.

17 THE COURT: -- for purposes of this motion?

18 All right. So the policy is an exhibit to  
19 the complaint for purposes of this motion.

20 Exhibits are part of the complaint to which  
21 they are attached and the factual allegations contained  
22 within an exhibit attached to a complaint serve to  
23 negate inconsistent allegations of fact contained  
24 within the body of the complaint.

1           I say that because, in some ways, this  
2       operates almost more like a 12(b)(6) than -- most 615's  
3       are sort of, if you haven't pled this element, you  
4       haven't pled that element, and this operates more sort  
5       of a -- whether or not there is a claim upon which  
6       relief can be granted based on the complaint itself.

7           And, for that reason, I point out simply that  
8       the exhibits to the complaint, which, in this case,  
9       includes the policy, the parties have asked the court  
10      to consider that as well.

11          Okay. Having said all of that, the critical  
12      language here, first, is the direct physical loss  
13      language, and the court finds that direct physical loss  
14      unambiguously requires some form of actual physical  
15      damage to the insured premises to trigger coverage.

16          The words *direct* and *physical*, which modify  
17      the word *loss*, ordinarily connote actual demonstrable  
18      harm of some form to the premises itself rather than  
19      force the closure of the premises for reasons  
20      extraneous to the premises itself or adverse business  
21      consequences that flow from such closure.

22          Defense counsel -- I'm sorry, the insurance  
23      counsel points out here that Illinois courts have not  
24      squarely addressed direct physical loss in this

1 context, but I do want to note in cases interpreting  
2 the word *physical* in insurance contracts, *physical* is  
3 widely held to exclude alleged losses that are  
4 intangible or incorporeal in Illinois, such as  
5 detrimental economic impact unaccompanied by a distinct  
6 demonstrable physical alteration of the property.

7 That's One Place Condo, LLC, versus  
8 Travelers, 2015 Westlaw, Northern District of Illinois,  
9 applying Illinois law.

10 The other case here that, I think, is  
11 particularly useful is, in fact, Judge Gettleman's  
12 decision in the northern district of -- I want to get  
13 this right -- Sandy Point Dental v. Cincinnati  
14 Insurance. This is 2020 Westlaw 5360465 dealing with  
15 very similar facts and similar policy language.

16 In this case, the court finds, just as in  
17 that case, plaintiff simply cannot show any such loss  
18 as a result of either inability to access its own  
19 office or the presence of the virus on its physical  
20 surface, the latter of which here plaintiff fails to  
21 allege in its complaint.

22 I don't think that's in dispute. There's no  
23 argument that the coronavirus was, in fact, on the  
24 surface of the property. The plaintiff has not pled

1 any facts showing physical alteration or structural  
2 degradation of the property, which is required to  
3 trigger coverage under this all risks policy.

4 The court wants to note that in addressing  
5 this insuring agreement argument, this holding is  
6 consistent with other courts that have evaluated  
7 whether the coronavirus causes property damage  
8 warranting insurance coverage.

9 Again, I want to reference 20 L -- I'm sorry,  
10 not 20 L. 2020 Westlaw 5360465. That's Sandy Point  
11 Dental versus Cincinnati Insurance.

12 I want to further note that Social Life  
13 Magazine versus Sentinel Insurance Company, denying a  
14 motion for preliminary injunction because the  
15 coronavirus does not cause direct physical loss;  
16 therefore, no coverage was required. The coronavirus,  
17 quote, damages lungs. It doesn't damage printing  
18 presses, close quote.

19 Diesel Barbershop versus State Farm Lloyds,  
20 2020 Westlaw 4724305, Western District of Texas,  
21 August 13, 2020, granting a motion to dismiss because  
22 the coronavirus did not cause a direct physical loss  
23 and, quote, the loss needs to have been a distinct  
24 demonstrable physical alteration of the property, close

1       quote.

2               I further want to direct the parties'  
3       attention to Gavrilides Management versus Michigan  
4       Insurance Company. This is a state court of Michigan  
5       handing down a decision last month that was cited by  
6       State Farm in this case explaining that direct physical  
7       loss to property requires tangible alteration or damage  
8       that impacts the integrity of the property and  
9       dismissing the case because plaintiff failed to allege  
10      that the coronavirus had any impact to the premises.

11              I want to point out that these are not  
12      controlling cases for purposes of an Illinois state  
13      court; however, the court finds that these cases just  
14      cited are, in fact, consistent with Illinois courts  
15      treating of physical damage under insurance policies.

16              And, of course, there are meaningful  
17      differences at times between first and third party  
18      policies and first and third policy claims; however,  
19      the court finds that there is a consistent line of  
20      reasoning by Illinois courts as far as what physical  
21      damage must mean for purposes of insurance coverage in  
22      this case.

23              In essence, to quote Judge Gettleman in the  
24      Sandy Point Dental Case, plaintiff here seeks coverage

1       for financial losses as a result of closure orders.  
2       And I don't think anybody really disagrees with that  
3       here.

4               The coronavirus has not physically altered  
5       the appearance, shape, color, structure, or other  
6       material dimension of the property and, as a result, it  
7       doesn't come within the insuring agreement and, as a  
8       result, plaintiff has failed to plead a direct physical  
9       loss, which is a prerequisite for coverage.

10              However, I do want to point out here that  
11       even if, even if, plaintiff had, in fact, been able to  
12       plead within the insuring agreement -- that this claim  
13       comes within the insuring agreement, the court does  
14       find that the virus exclusion applies.

15              Now, the virus exclusion, which is Exclusion  
16       J under Section 1 of the policy, states as follows --  
17       and there's important, what we'll call, lead-in  
18       language that I want to direct the parties' attention  
19       to. The lead-in language under Section 1 exclusions,  
20       which applies to all coverage forms under this all  
21       risks policy, all coverage forms incorporate Section 1,  
22       the lead-in language states as follows: We do not  
23       insure under any coverage for any loss which would not  
24       have occurred in the absence of one or more of the



1 following excluded events.

2 We do not insure for such loss regardless of,  
3 A, the cause of the excluded event; or, B, other causes  
4 of loss; or, C, whether other causes acted concurrently  
5 or in any sequence with the excluded event to produce  
6 the loss; or, D, whether the event occurred suddenly or  
7 gradually, involves isolated or widespread damage,  
8 arises from natural or external forces, or occurs as a  
9 result of any combination of these, and it begins to  
10 list the exclusions.

11 So the virus exclusion is Exclusion J. The  
12 heading, which does not control, says fungi, virus, or  
13 bacteria. Paragraph 1 states, Growth, proliferation,  
14 spread, or presence of fungi or wet or dry rot or, new  
15 paragraph, 2, Virus, bacteria, or other microorganism  
16 that induces or is capable of inducing physical  
17 distress, illness, and disease.

18 For our purposes, those are the relevant  
19 provisions of the virus exclusion that needs to be  
20 addressed here. First, the court finds that the  
21 growth, proliferation, spread, or presence is not  
22 required for purposes of applying the virus exclusion  
23 because that is in a separate paragraph designed to  
24 address fungus or fungi. There are not just one but

1 two disjunctive *or*'s in between fungus and virus  
2 because it goes fungus -- or states fungus or wet or  
3 dry rot or and then a new paragraph starting with the  
4 word *virus* enumerated as number two.

5 So the court finds that it doesn't have to  
6 establish a growth of a virus, just simply the idea of  
7 a virus, the fact that a virus that is capable of  
8 inducing physical distress, illness, or disease.

9 Even if -- if, in fact, this was some kind of  
10 physical -- accidental physical damage, physical loss  
11 coming within the insuring agreement, the virus  
12 exclusion applies because Subsection C of the lead-in  
13 language says this virus exclusion applies whether  
14 other causes, executive orders, acted concurrently or  
15 in any sequence with the excluded event to produce the  
16 loss.

17 Here, I think everyone would agree absent the  
18 virus, absent the virus, there would be no executive  
19 orders, and so because C says this exclusion would  
20 apply even where the sequence of the ordering with  
21 other causes isn't entirely known or isn't entirely  
22 clear or happens one two or two one, it still applies.

23 Furthermore, whether or not a virus could, in  
24 fact, alter the physical structure, I think that's a

1 much -- that's not entirely clear at all that a virus  
2 could.

3 And that's plaintiff's -- or I'm sorry,  
4 insured's argument is the virus exclusion doesn't make  
5 any sense for a sort of physical alteration requirement  
6 of physical damage -- or a loss of, I should say --  
7 physical loss because a virus would never alter the  
8 physical structure.

9 The court doesn't agree with that. Virus,  
10 bacteria, and microorganisms can exist in, in fact, a  
11 meaningful way, and I think there's a strain of thought  
12 out there that at one time was dominant -- it still may  
13 be true to a certain extent -- that this virus can  
14 exist on surfaces.

15 So even if the loss of use because of  
16 coronavirus could constitute, the virus exclusion would  
17 still apply -- could constitute physical -- accidental  
18 physical loss, direct physical loss, I should say --  
19 the virus exclusion applies.

20 And so for those reasons, the court is going  
21 to grant the motion to dismiss.

22 I want to point out -- or I do want to  
23 address the authority provided by Harold's Chicken --  
24 It's Nice, Inc., d/b/a Harold's Chicken. A couple

1 things, I think, are worth pointing out.

2 One is the State Farm language here -- not  
3 only are those cases from the western district and, as  
4 a result, they're not controlling, the court believes  
5 or is of the opinion that the cases relied upon for its  
6 ruling today are more consistent with Illinois law as  
7 it exists with respect to this issue.

8 Furthermore, the policy language was  
9 different in those western district cases. And that's  
10 not to say that the result would be different if you  
11 had identical language, but I do think that's different  
12 language.

13 And, moreover, and perhaps importantly, the  
14 court was evaluating a 12(b)(6) motion in which the  
15 insureds in that case allege the presence of COVID on  
16 the property. And, to the court's mind, that is a --  
17 that's a meaningful distinction here.

18 And, again, there's no virus exclusion in  
19 that policy that the court would have had to have  
20 considered as well and we don't know what the court  
21 would have done in that case.

22 But I do think, at least for purposes of the  
23 insuring agreement argument, those cases are  
24 distinguishable without regarding -- without, you know,

1     advising as to what the result would be in this court.  
2     But I do think those are different cases and they need  
3     to be treated differently as such.

4             And so, for those reasons, the court is going  
5     to go ahead and grant the motion both with respect to  
6     the insuring agreement argument as well as with respect  
7     to the virus exclusion.

8             I do want to point out, for the record, the  
9     insured does not seem to argue -- kind of seems to have  
10    one foot in and one foot out on civil authority.  
11    They're happy to find civil authority coverage if it  
12    exists, but they're not specifically asking for it.

13            But I want to point out, for the record,  
14    that, as noted above, the policy's civil authority  
15    coverage applies only if there is a covered cause of  
16    loss, meaning direct physical loss, again, going back  
17    to direct physical loss to property other than the  
18    plaintiff's property.

19            Just as the coronavirus did not cause direct  
20    physical loss to plaintiff's property here, the  
21    complaint has not and likely could not allege that the  
22    coronavirus caused direct physical loss to other  
23    property. By the policy's own terms, the civil  
24    authority coverage then does not apply.

1           So with that having been said, I'm granting  
2     the motion. You know, I'm kind of -- do the parties  
3     want a dismissal with prejudice?

4           MS. SCHUMACHER: Your Honor, we are asking for a  
5     dismissal with prejudice, the reason being their claim  
6     is for the loss of income due to the executive orders  
7     which is caused by the virus, and without alleging a  
8     completely different kind of claim, there's no set of  
9     facts that they're going to be able to allege that's  
10    going to avoid that result.

11           The executive orders are full of references  
12    to the virus. The chain of causation is strong. The  
13    virus exclusion is present. And, again, the same thing  
14    with the physical damage issue. There's no claim that  
15    there was any structural alteration to the property.

16           So I think in this case, your Honor, on that  
17    basis, I don't think there's any way they're going to  
18    be able to plead around either of those issues, and so  
19    we are asking for a dismissal with prejudice.

20           THE COURT: Mr. Endsley, any response to that or  
21    are you in agreement that this is time for other minds  
22    to evaluate this claim?

23           MR. ENDSLEY: Yeah, your Honor, that's probably  
24    correct. I don't think we can change the pleading such

1       that -- to get around the issues that you're finding  
2       are insurmountable.

3           THE COURT: I don't disagree. It is a 615, and so  
4       I do want to just at least give the parties the  
5       opportunity to request without -- whether or not I give  
6       that is a different issue, but it sounds like the  
7       parties are of one mind and the court is in agreement  
8       that this dismissal for this type of a 615 motion is  
9       and should be with prejudice, and the court will enter  
10      such an order.

11       MS. SCHUMACHER: Thank you, your Honor.

12       THE COURT: Okay.

13       MR. ENDSLEY: Thank you, your Honor.

14       THE COURT: Thank you, guys. Thank you very much  
15      for your time and energy on this. I want to commend  
16      the parties. I know this is a very interesting issue  
17      under very -- a very unique set of facts.

18       MS. SCHUMACHER: Thank you, your Honor.

19       MR. ENDSLEY: Thank you, your Honor.

20       THE COURT: Thank you.

21                   (Which were all the proceedings had at  
22                   the hearing of the above-entitled  
23                   cause, this date.)  
24

1           IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT

2                   DU PAGE COUNTY, ILLINOIS

3  
4  
5                   I, KRISTIN M. BARNES, do hereby certify that  
6       the foregoing Report of Proceedings, consisting of  
7       Pages 1 to 39, inclusive, was reported in shorthand by  
8       me via Zoom videoconferencing, and the said Report of  
9       Proceedings is a true, correct and complete transcript  
10      of my shorthand notes so taken at the time and place  
11      hereinabove set forth.

12  
13  
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